

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DE LAGE LANDEN FINANCIAL  
SERVICES, INC.,

Plaintiff,

TOSHIBA AMERICA MEDICAL  
SYSTEMS, INC.,

Plaintiff/Intervenor,

v.

DESOTO DIAGNOSTIC IMAGING, LLC,  
RANDON J. CARVEL, LYNN T. CARVEL,  
DELTA RADIOLOGY, PC and  
ZOBAR PROPERTIES, LLC,

Defendants and Counter-  
Claimants.

CIVIL ACTION NO. 2:02CV2810

**PRAECIPE TO ATTACH SUPPLEMENTAL EXHIBIT TO MOTION TO COMPEL  
DEPOSITION TESTIMONY OF DAVID BENNETT**

TO THE CLERK:

Defendants and Counter-Claimants, DESOTO DIAGNOSTIC IMAGING, LLC, RANDON J. CARVEL, LYNN T. CARVEL, DELTA RADIOLOGY, P.C. and ZOBAR PROPERTIES, LLC, ("DDI), by and through their attorneys TATE LAW FIRM, by Kyle P. Tate, hereby request that in the interest of justice the attached supplemental exhibit be included in Defendants' October 27, 2003 filing entitled Motion to Compel Deposition Testimony of David Bennett, which was not included in Defendants' original filing for reasons explained therein.

1. Defendants served their Motion to Compel Deposition Testimony of David Bennett and Memorandum in support thereof on October 23, 2003, which was filed with this Court on October 27, 2003.

2. Therein, Defendants state that the issue of whether Mr. Bennett should be compelled to testify could be properly brought – or renewed – in the Pennsylvania action, based upon Judge Haynes' courtroom dialogue explaining his ruling.

3. Having now received the official Transcript of Proceedings, Defendants respectfully direct this Court's attention to pages 23:9 – 18, as follows:

MR. TATE: It's my understanding in the federal district courts that the district in Philadelphia would not have power to compel Mr. Bennett's testimony, or compel him through (sic) a deposition. It would be through this district, [the Middle District of Tennessee, Nashville Division], Your Honor.

THE COURT: I think that that would be true if he were not an agent of the party. If he was an agent of a party, **the Court [in Philadelphia] could require him to appear where the action is pending.**

4. Defendants also request this Court to take notice of page 24:2 – 5, as follows:

THE COURT: I'm going to grant the motion for protective order and quash the subpoena **without prejudice to be filed in the District Court in Pennsylvania.**

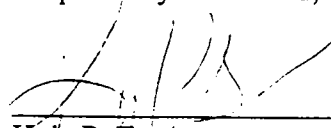
5. In further support of the arguments in their Motion, Defendants respectfully direct this Court's attention to pages 21:11 through 24:18 of the attached Transcript of Proceedings which sets forth the oral argument of the parties, in particular Mr. Hicks' position that the Pennsylvania court could compel Mr. Bennett's deposition testimony, and Judge

Haynes' colloquy given in open Court for his ruling granting the motion to quash and protective order without prejudice to renew, which are fully set forth in the section referenced above.

Dated: October 31, 2003

Respectfully Submitted,

By:

  
\_\_\_\_\_  
Kyle P. Tate


for Tate LAW FIRM  
9085 Sandidge Center Cove  
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that the foregoing has been served upon the attorney of record for all other parties in this proceeding and upon parties not represented by attorneys by telefax or by Federal Express, or by delivering a copy of this pleading to the attorney or party personally, or to the offices of such attorney or party, or by placing a copy in the U.S. Mail addressed to such attorney or party named below at his office with sufficient prepaid postage on this 31<sup>st</sup> day of October, 2003.

Mr. John Chesney  
Ms. Julianne Peck  
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\_\_\_\_\_  
Kyle P. Tate

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE MIDDLE DISTRICT OF TENNESSEE  
3                   NASHVILLE DIVISION

4 DELANGE LANDEN FINANCIAL                   )  
5 SERVICES, Inc.                                )

6 and    )

7 TOSHIBA AMERICA MEDICAL                   )  
8 SYSTEMS, INC.                                )

9                   Plaintiff,                   )

10 v.    )

CASE NO. 3:03-0097

11 DESOTO DIAGNOSTIC                           )  
12 IMAGING, LLC, et al,                        )

13                   Defendants.                   )

14                   TRANSCRIPT OF PROCEEDINGS

15  
16 DATE:                               OCTOBER 9, 2003

17 TIME:                               10:00 A.M.

18 BEFORE:                           THE HONORABLE WILLIAM J. HAYNES, JR.  
19 -----

20  
21  
22  
23 COURT REPORTER:                   PEGGY G. TURNER, RPR CCR  
24                                       OFFICIAL COURT REPORTER  
25                                       801 BROADWAY, ROOM A-837  
                                      NASHVILLE, TENNESSEE 37203  
                                      (615) 726-4893

A P P E A R A N C E S

For the Plaintiff: Mr. John Hicks  
Nashville, Tennessee

For the Defendant: Mr. Kyle Tate  
Memphis, Tennessee

1 P R O C E E D I N G S

2 THE COURT: We're here in Delage Landen  
3 Financial Services, Inc. and Toshiba America Medical  
4 Systems, Inc. v. Desoto Diagnostic Imaging, LLC, et al,  
5 3:03-0097. Are there any preliminary matters before we  
6 get started?

7 MR. HICKS: None, Your Honor, for the movant.

8 THE COURT: There was a request to appear pro  
9 hoc vice that I granted. I read your motion and your  
10 paper. I really need to hear from counsel, Mr. Elliot,  
11 why you need to take the deposition in light of this  
12 proof that this guy doesn't know anything about this  
13 case?

14 MR. TATE: Your Honor, Mr. Tate for Desoto  
15 Diagnostic Imaging and the other defendants.

16 THE COURT: I'm sorry, Mr. Tate.

17 MR. TATE: I think Mr. Elliot moved for my  
18 admittance. The motion, Your Honor, with all due  
19 respect with to Mr. Hicks, was drafted by attorneys in  
20 Philadelphia. And I believe the motion and brief that  
21 was filed by -- Mr. Hicks had no knowledge whatsoever.

22 THE COURT: All right, sir. But there is an  
23 affidavit that he knows nothing about this case.

24 MR. TATE: Your Honor, can I brief the Court  
25 just shortly what the real facts are so I can show the

1 Court and provide the proof.

2 THE COURT: What is it that you have that would  
3 place at issue Mr. Bennett's assertion that he doesn't  
4 know anything about this case?

5 MR. TATE: First of all, Your Honor, in the  
6 brief it stated that Mr. Bennett has no involvement in  
7 the case whatsoever, which is absolutely incorrect.

8 THE COURT: Counsel, if you could answer my  
9 question, and then I will hear you out on what else you  
10 have to say.

11 MR. TATE: Yes, Your Honor. Mr. Bennett has  
12 knowledge about Mr. Charlie -- this is a very complex  
13 case. Charlie Ryan is the area service manager with  
14 Toshiba that was designated for my client's business at  
15 the time of the action. Mr. Charlie Ryan was a  
16 superior of Donnie Jenkins. He was an engineer that  
17 worked at Diagnostic Imaging Center.

18 The issues are that Donnie Jenkins made a  
19 statement to some individuals at Toshiba regarding that  
20 he may be canned if he spoke up regarding certain  
21 employment issues. That's how the movant in this  
22 matter styled it.

23 That's really not the case, Your Honor. The  
24 characterization of the statement about being fired  
25 was, Donnie Jenkins actually had complaints about



1 Charlie Ryan, the area service manager, and wanted to  
2 make those complaints known based on his management  
3 style and how he was treating service engineers and  
4 other related matters. Mr. Bennett has specific  
5 knowledge about Charlie Ryan in this conversation with  
6 Mr. Jenkins.

7 THE COURT: How is it related --

8 MR. TATE: I'm sorry, Your Honor.

9 THE COURT: That's all right. Go ahead.

10 MR. TATE: It relates to the situation because  
11 it's extremely relevant as to the credibility of  
12 Charlie Ryan and his capabilities as the area service  
13 manager. It's extremely relevant as to Mr. Jenkins'  
14 capabilities and credibilities, as Mr. Bennett referred  
15 Mr. Jenkins to Charlie Ryan for hire.

16 Mr. Jenkins has knowledge about Mr. Bennett as a  
17 service engineer, and how it relates to this case --  
18 one of the central issues is unqualified incompetent  
19 service engineers sent to Diagnostic Imaging.  
20 Mr. Bennett has direct knowledge of that. Mr. Bennett  
21 also has knowledge about particular matters at hand  
22 regarding certain disclosures that were made in this  
23 case to date. If I may present those to Your Honor.

24 THE COURT: Whatever you want, counsel.

25 MR. TATE: Respondent's Exhibit Number 1. Your

1 Honor, these are disclosures that were made in the  
2 pending litigation in Philadelphia that specifically  
3 name Mr. Bennett and his association with this case.

4 If I could advise Your Honor that within this  
5 matter there are only a few qualified MRI service  
6 engineers in the entire country, Mr. Bennett being one  
7 of those. One of the issues in the case was the fact  
8 that TAMS or Toshiba did not provide defendant with  
9 qualified, competent service engineers and had a major  
10 shortage of service engineers despite the warranty that  
11 they could provide. TAMS 6557 reveals that Mr. Bennett  
12 was paged because of this exact shortage I'm talking  
13 about.

14 This also has to do with a zap error that  
15 occurred on the MRI system which only very few MRI  
16 service engineers could speak of and explain the  
17 situation. Obviously, these are central issues in the  
18 case as far as workings of the equipment and whether  
19 the equipment was working or not, as my client  
20 contends.

21 Mr. Bennett would have to testify per Rule 26  
22 regarding his knowledge about the zap errors and the  
23 fact that he was called when no other service engineers  
24 were available, which obviously shows and provides  
25 proof of the shortage of the service engineers in the

1 case.

2           They left my client basically high and dry in  
3 this scenario. Mr. Bennett has knowledge about that.  
4 I've marked DDI 007080 also, Your Honor. It makes  
5 reference to a conversation Mr. Bennett had with my  
6 client regarding this particular service call.

7           THE COURT: Where are you talking about, now?

8           MR. TATE: DDI 007080. It's on the third page  
9 of that exhibit, 06270, reference number 1045397. It  
10 confirms a telephone conversation with my client, Your  
11 Honor, which we are entitled to discover the content of  
12 that conversation and the content of the zap error  
13 occurred only -- which very few people have knowledge  
14 of these certain type of errors. This is a very  
15 limited industry as far as people understanding how to  
16 operate, work and repair this equipment. So he has  
17 knowledge about that. It goes on and TAMS 114, on the  
18 fifth and sixth page, the same reference, Your Honor,  
19 whereas Mr. Bennett spoke to the Jo Ann Tucker, a  
20 former employee of the facility, regarding the zap  
21 error.

22           THE COURT: You are on TAMS 14, page 5?

23           MR. TATE: Yes, the Bates stamp --

24           THE COURT: Where is there a reference to a  
25 telephone call?

1 MR. TATE: Reference to the telephone call, Your  
2 Honor, is in DDI 00782, which provides the reference  
3 number now that I am pointing to you regarding the zap  
4 error.

5 THE COURT: I'm sorry, counsel. I don't see.

6 MR. TATE: May I approach?

7 THE COURT: Just tell me which column.

8 MR. TATE: Your Honor, in DDI.

9 THE COURT: I'm on page 5 of TAMS 118, with a  
10 Bates stamp at the bottom. Which column?

11 MR. TATE: Next page TAMS 118, TAMS 119, column  
12 10397, left-hand column annex page where it says P2 II  
13 Jo Ann Tucker zap error. Which is also confirmed in  
14 the first page of that exhibit which lists the zap  
15 error.

16 THE COURT: Where is the reference to Bennett?

17 MR. TATE: The reference to Mr. Bennett is in  
18 TAMS 6557, 6558, and also in --

19 THE COURT: I thought we were on TAMS 118. If  
20 we are, where in this does it refer to Bennett?

21 MR. TATE: Your Honor, it's referred by  
22 reference number. That's how Toshiba identifies --

23 THE COURT: Which reference number here do you  
24 contend applies to Bennett? It says case ID number.

25 MR. TATE: 1045397, Your Honor, which is the

1 same DDI 00782 and --

2 THE COURT: What is the number again?

3 MR. TATE: 1045397, which is the reference  
4 number listed on DDI 00782, and also on TAMS --

5 THE COURT: I'm sorry, counsel. They've got a  
6 lot of numbers on this left-hand column.

7 MR. TATE: May I approach, Your Honor, and show  
8 you real quick?

9 THE COURT: Mark on it yours and give it to the  
10 Marshal. No, just mark it. I don't want the Marshal  
11 to have to interpret this. Just mark it.

12 MR. TATE: They are marked, Your Honor.

13 THE COURT: This says J. Scott, closed. What is  
14 the significance of this?

15 MR. TATE: That is the case work report. The  
16 actual service engineer that was involved was  
17 Mr. Bennett as listed down on the page. That's just  
18 how they designate who designated the reference number.  
19 Mr. Bennett is referenced throughout the first two  
20 pages of that.

21 THE COURT: Where in the record is there a  
22 conversion of this number as identifying Mr. Bennett?

23 MR. TATE: On the case report, Your Honor.

24 THE COURT: Yes, but where is it before me that  
25 refers to that?

1 MR. TATE: I've given it to Your Honor. The  
2 case report, the next DDI disclosure, Your Honor, and  
3 then the next report from Toshiba.

4 THE COURT: I'm looking at these documents --  
5 they don't say on their face what it is you say they  
6 say.

7 MR. TATE: Your Honor, I --

8 THE COURT: It has an ID number, and the  
9 references below refer to people other than  
10 Mr. Bennett. They refer, for example, to Ray  
11 Roskowski, Michael Barr, there is a Jo Ann, there are a  
12 number of references. There are different names on  
13 here, and it doesn't -- there is nothing on here that  
14 says 1045397 means Mr. Bennett.

15 MR. TATE: Your Honor, may I approach? I am  
16 begging you so I can show you. These are very  
17 convoluted.

18 THE COURT: I'm looking at everything you have  
19 underlined. That's what I'm looking at, what you have  
20 underlined on TAMS 6557.

21 MR. TATE: I thought you asked me to circle or  
22 mark the actual reference number. Mr. Bennett is  
23 listed on that document all the way through.

24 THE COURT: I know he is listed on the document.  
25 There are a number of other people listed on the

1 document.

2 MR. TATE: I understand, Your Honor. He is the  
3 one that was contacted regarding this matter per that  
4 document. And he's the one that has the information  
5 regarding the issue and the zap error and the content  
6 of the conversation with my client, Your Honor. He has  
7 relevant information per Rule 26.

8 THE COURT: I'm trying to work this through on  
9 the basis of what you have given me. And I'm having  
10 difficulty making the connections that you want me to  
11 make. There is nothing on TAMS 114 through 119, the  
12 two areas that you have marked, that make any expressed  
13 reference to Bennett.

14 MR. TATE: May I retrieve the documents back  
15 again and try again to point it out?

16 THE COURT: Well, I asked you to mark, and I'm  
17 looking at the two portions you marked. Is there  
18 anything else on here you want to mark?

19 MR. TATE: No, Your Honor. If I had the  
20 documents I could try to clarify. Maybe I haven't done  
21 a good job.

22 THE COURT: Well, I'll give them back to you,  
23 and you tell me what you are referring to.

24 MR. TATE: I apologize.

25 THE COURT: That's all right.

1 MR. TATE: Is there a deposition that refers to  
2 that number as Mr. Bennett?

3 MR. TATE: No, Your Honor. It's within the  
4 disclosures on the litigation.

5 THE COURT: Well, the disclosures on the  
6 litigation can involve any number of sources. Was  
7 there --

8 MR. TATE: These are disclosures from Toshiba  
9 representatives, Your Honor.

10 THE COURT: We're talking about Mr. Bennett.

11 MR. TATE: I understand. May I have an  
12 opportunity just to try to explain?

13 THE COURT: Yes, sir.

14 MR. TATE: On TAMS 6557 -- and would Your Honor  
15 look at the documents with me so maybe I could explain  
16 it, with all due respect?

17 THE COURT: We'll be in recess for a few  
18 minutes.

19 (Recess.)

20 THE COURT: I just want the record to reflect  
21 that you handed me up these documents, you made  
22 references on the documents, and I had no idea what you  
23 were referring to. I asked you to mark it, and I  
24 looked at the mark references, and I still couldn't  
25 figure out what you were saying. So I will try again,



1 because obviously I'm missing something.

2 MR. TATE: I apologize, Your Honor. Obviously  
3 I've done a poor job of explaining, so I will try.

4 THE COURT: That's all right.

5 MR. TATE: Looking at -- regarding Mr. Bennett,  
6 on the TAMS document 6557, the reference number, the  
7 case report, 1045397, is also listed in the middle of  
8 the page as the ID number 1045397. And also below  
9 where it is listed as where it says, state subject case  
10 under the case entry, where it says 1045397 regarding  
11 David Bennett called, still opening, still unanswered,  
12 below that, it still lists the same number, David  
13 Bennett has called, he requested to get hold of the  
14 primary, et cetera.

15 THE COURT: That appears to refer to the case  
16 number. It says at the top case title, zap error, KG  
17 ID 0145397.

18 MR. TATE: Correct, Your Honor. Which is the  
19 same reference number --

20 THE COURT: I recognize the same number, but  
21 there is nothing to suggest on this document that that  
22 refers to Mr. Bennett.

23 MR. TATE: The case numbers, Your Honor, right  
24 out to the side are the exact same.

25 THE COURT: I realize they are the exact same,

1 but that says subcase. That's the case number. Looks  
2 like it refers to a case number, not a person.

3 MR. TATE: The only number listed on this  
4 document regarding case number or case report is  
5 104597.

6 THE COURT: Well, if it's the same case, I  
7 expect that's probably what happened.

8 MR. TATE: It is the same number, Your Honor.

9 THE COURT: What is there before me that says  
10 that that case number refers to a person and not a  
11 subcase?

12 MR. TATE: Your Honor, the way Toshiba does  
13 their numbering --

14 THE COURT: That's what I'm asking you for,  
15 counsel. Where is the proof that that's how Toshiba  
16 does it?

17 MR. TATE: The documents exposed in litigation  
18 are as such --

19 THE COURT: What do you have to present to me  
20 that that's how Toshiba does it? Do you have a  
21 deposition? Do you have an affidavit? Do you have any  
22 type of declaration that says that's how we identify  
23 the salesperson who works on a case?

24 MR. TATE: Their own case reports, Your Honor,  
25 is all I'll have. I have had two days since this

1 motion was filed to get prepared for you. Obviously  
2 I'm not explaining. May I show you deposition  
3 testimony regarding Mr. --

4 THE COURT: That's what I asked you earlier.  
5 Whatever you want to show, I would be pleased to see  
6 it.

7 MR. TATE: I would like to mark that as  
8 Respondent's Exhibit Number 2. I would like to look at  
9 beginning line 13 on the second page of this exhibit  
10 where Mr. Ryan makes mention of Mr. Bennett and that  
11 Mr. Bennett -- and this is the summary of what was  
12 said, is that Mr. Bennett had recommended Mr. Jenkins  
13 for hiring. He had filled out a referral form,  
14 referring him or recommending him for hire, which was  
15 the central issue in the case regarding the  
16 capabilities of Mr. Jenkins as service engineer for  
17 this Diagnostic Imaging. He would have relevant  
18 information regarding that. It runs through the top of  
19 the third page, Your Honor.

20 THE COURT: This is a reference to Mr. Bennett  
21 recommending Mr. Jenkins for hire.

22 MR. TATE: Correct.

23 THE COURT: It doesn't say he recommended him to  
24 repair on your particular job, does it?

25 MR. TATE: Your Honor, the overall issue is the

1 engineer's overall competency and capabilities as a  
2 service engineer. Not necessarily with respect to  
3 anyone in a particular facility. If he is not  
4 competent or capable at all, he is not competent in any  
5 facility.

6 THE COURT: Anything else?

7 MR. TATE: Yes, Your Honor. I give these as  
8 Respondent's Exhibit Number 3. Your Honor, this would  
9 be the deposition of Mr. Jenkins in a tape recorded  
10 conversation with between Doctor Carvel and  
11 Mr. Jenkins, which is also part of the deposition.

12 THE COURT: What page of this deposition do you  
13 want me to read?

14 MR. TATE: Page 277, Your Honor, which is  
15 actually the --

16 THE COURT: 277 to how far?

17 MR. TATE: Beginning at the bottom of page 276,  
18 through the middle of the page on 277.

19 THE COURT: Well, which line?

20 MR. TATE: Starting with line 23 on page 276.

21 THE COURT: To where?

22 MR. TATE: Running through line 12 on page 277.  
23 It mentions the concern of being canned if he spoke up  
24 for the issues that Mr. Ryan was there to serve as  
25 service manager.

1 THE COURT: This doesn't make any reference to  
2 Mr. Bennett.

3 MR. TATE: Your Honor, we had to go on the  
4 record with Judge Buckwalter in Philadelphia, the  
5 Eastern District. Mr. Jenkins had refused to give that  
6 information. It's in this particular exhibit where we  
7 went off the record. And the judge in Philadelphia  
8 ruled that it was relevant information regarding  
9 Mr. Bennett in the case.

10 THE COURT: Do I have all that before me?

11 MR. TATE: You do. It's in this transcript,  
12 Your Honor.

13 THE COURT: Well, where is it?

14 MR. TATE: That would be on page 286, Your  
15 Honor, where it says there was a short break after  
16 strenuous opposition.

17 THE COURT: 286, what line?

18 MR. TATE: Line five shows where a short break  
19 was held and Mr. Chesney comes back on the record and  
20 says the judge should answer the question regarding  
21 Mr. Bennett.

22 THE COURT: Where is the question he refused to  
23 answer?

24 MR. TATE: Actually, it was asking who the  
25 friend of Donnie Jenkins was who mentioned the fact

1 that Donnie should not state anything or he would be  
2 canned.

3 THE COURT: Where is that?

4 MR. TATE: On many of the previous pages about  
5 going back and forth on the issue.

6 THE COURT: Is there an order of the District  
7 Court that reflects the Court's ruling?

8 MR. TATE: It was off the record, Your Honor,  
9 and we had to call him in at 4:30. It was a later  
10 time. He heard the arguments from both sides, the same  
11 arguments I'm making here, and he ruled that  
12 Mr. Bennett's name should be revealed by Mr. Jenkins.

13 THE COURT: All right. What else do you want to  
14 point out about that? You gave me two excerpts. What  
15 other pages do you want me to read from this excerpt?

16 MR. TATE: The second excerpt is also a recorded  
17 conversation that you have seen all of the relevant  
18 information. I just want you to have all of the  
19 documents before you.

20 THE COURT: If you could give me the page and  
21 line number, that would be helpful.

22 MR. TATE: Pages 36 and 37, Your Honor, of the  
23 second excerpt. Starting on line 10, page 36, and  
24 running through line 70, page 37. 36 and 37.

25 THE COURT: Where is Mr. Bennett's name?

1 MR. TATE: That was in the first transcript we  
2 looked at where I asked a question regarding who was  
3 the friend who told you that you would be canned. And  
4 that's when we had to call Judge Buckwalter.

5 THE COURT: He said Donnie Jenkins was the one  
6 that he described. But this conversation doesn't refer  
7 to Mr. Bennett, does it?

8 MR. TATE: It does in the first transcript.

9 THE COURT: That's what I'm asking for, counsel.  
10 Where are the pages that describe this as referring to  
11 Mr. Bennett? You asked me to look at pages 36 and 37.  
12 I don't see Mr. Bennett's name on any of those pages.  
13 Now, I may have missed it, but --

14 MR. TATE: It was on the reference, Your Honor,  
15 where Mr. Chesney has instructed the witness to answer  
16 the question.

17 THE COURT: I got that part. I asked you, what  
18 is it about this second part that you wanted me to see?  
19 And you said pages 36 and 37. I looked at those pages.  
20 There is no reference to Bennett on it.

21 MR. TATE: That is the recorded conversation.

22 THE COURT: I know. There is no reference to  
23 Mr. Bennett.

24 MR. TATE: Not in that conversation; only in the  
25 deposition transcript of Mr. Jenkins, Your Honor.

1 THE COURT: Well, why am I looking at this?

2 MR. TATE: For clarity, for purposes of the tape  
3 that was played during the deposition and for the  
4 questions, if you had any questions, regarding actually  
5 what the tape said.

6 THE COURT: Yes, but the only question here is  
7 what is the factual basis for taking Mr. Bennett's  
8 deposition. And that's what I was trying to focus on.

9 MR. TATE: On page 286, Your Honor, of the first  
10 transcript, Mr. Jenkins finally answered the question  
11 regarding Mr. Bennett, regarding making statements,  
12 regarding issues of Charlie Ryan and his capabilities,  
13 regarding his abilities.

14 THE COURT: All right. Anything else?

15 MR. TATE: I would like to add, based on the  
16 evidence and support provided here today, per Rule 26,  
17 that the evidence has to do with the claims and  
18 defenses in the case, the claims and services have to  
19 do with the service engineer's capabilities, the  
20 service engineer's competency.

21 THE COURT: Who made the decision to hire the  
22 engineer at issue?

23 MR. TATE: Who made the ultimate decision?  
24 Mr. Ryan, through referral from Mr. Bennett.

25 THE COURT: All right. But Ryan made the



1 decision on his competence.

2 MR. TATE: Mr. Bennett filled out a form  
3 regarding his capabilities, or Mr. Ryan, when he would  
4 consider Donnie Jenkins.

5 THE COURT: Anything else?

6 MR. HICKS: If the Court wishes to hear anything  
7 else from me, John Hicks, I'm glad to follow up.

8 THE COURT: Did the District Court in wherever  
9 it is, Pennsylvania, rule that information about  
10 Bennett's conversation was relevant?

11 MR. HICKS: Your Honor, my reading of the  
12 deposition is that Judge Buckwalter said that he had to  
13 reveal that name. That's all. The judge didn't rule  
14 that the topic of the conversation or that anything  
15 Mr. Bennett had to say had anything to do with this  
16 case.

17 The only thing the judge said in a conversation  
18 held during a break in a deposition by telephone is  
19 that he didn't have a record before him, and it seemed  
20 like he ought to reveal the name, Your Honor. He  
21 didn't make any ruling at all, and there is no ruling  
22 in the record in Pennsylvania, that Mr. Bennett has any  
23 knowledge that's discoverable in this case.

24 If I could point one thing out. Mr. Bennett is  
25 an employee of Toshiba. And if his testimony is so

1 important, then the lawyers in Pennsylvania would have  
2 an obligation to produce him. If they objected to  
3 that, it seems to me that the appropriate remedy for  
4 the parties represented here would be to go to Judge  
5 Buckwalter and say, Judge, compel them to produce this  
6 man for a deposition. There is no doubt he is a chief  
7 employee.

8           Instead, there is a subpoena issued out of this  
9 court. And I'm faced with, and the Court is faced  
10 with, a deluge of information we're trying to sort  
11 through and figure out what's appropriate in order to  
12 get some relief on this matter.

13           And if this information was truly discoverable  
14 and appropriate, and the motives behind it were  
15 appropriate, then it seems to me that the appropriate  
16 place to address the issue would be Judge Buckwalter,  
17 who knows everything about this case.

18           But that's not what happened. What happened is,  
19 a subpoena issued out of this Court, and Mr. Bennett  
20 had no alternative but to come to this Court and seek  
21 relief. I haven't heard anything to rebut the  
22 affidavit of Mr. -- Mr. Hicks was not present during  
23 the hearing. We went through the same exact issues  
24 Judge Buckwalter did.

25           MR. TATE: Your Honor, one final point.

1 THE COURT: Yes.

2 MR. TATE: I will, for the record, state that  
3 Mr. Bennett did have relevant information that was  
4 discoverable. That's why he instructed Mr. Chesney to  
5 instruct his client, Mr. Jenkins, to answer the  
6 question.

7 As far as subpoenaing the client or the witness,  
8 I have e-mails dating back to early September asking  
9 for this witness to be produced. It's my understanding  
10 in the federal district courts that the district in  
11 Philadelphia would not have power to compel  
12 Mr. Bennett's testimony or compel him through a  
13 deposition. It would have to be through this district,  
14 Your Honor.

15 THE COURT: I think that that would be true if  
16 he were not an agent of the party. If he was an agent  
17 of a party, the Court could require him to appear where  
18 the action is pending.

19 MR. TATE: There was no ill intent or motive as  
20 far as subpoenaing. The parties knew it for two months  
21 now. As far as producing Mr. Jenkins, they have had  
22 plenty of notice.

23 THE COURT: Did you file a motion up there and  
24 the District Court denied it?

25 MR. TATE: No, Your Honor. No motion to compel

1 has been filed in that district.

2 THE COURT: I'm going to grant the motion for  
3 protective order and quash the subpoena without  
4 prejudice to be filed in the District Court in  
5 Pennsylvania. I don't have enough information about  
6 this suit to assure the Court that this deposition of  
7 Mr. Bennett should be granted. There is no ruling --  
8 no order of the court in the Pennsylvania on this issue  
9 and the exhibits to which I have been referred are too  
10 ambiguous on their face to draw the inference that  
11 counsel is asking me to draw. So I'm going to grant it  
12 without prejudice to renew there.

13 If the court up there decides that it doesn't  
14 have the jurisdiction or doesn't have the ability to  
15 issue it, you could refile it here. But if you refile  
16 it here, I think you should submit a lot more proof  
17 than what you've got before the Court now.


18 We'll be in recess for a few minutes.  
19  
20  
21  
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REPORTER'S CERTIFICATE

I, Peggy G. Turner, Official Court Reporter for the United States District Court for the Middle District of Tennessee, with offices at Nashville, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on October 9, 2003, in the matter of DELAGE LANDEN, et al v. TOSHIBA, et al, Case No. 3:03-0097; That said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (pages 1 through 24) is a true and accurate record of said proceedings.

This the 27th day of October 2003.

  
Peggy G. Turner, RPR  
Official Court Reporter